89-991

No. _____

FILED
DEC 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

IN RE: ESTATE OF MALLIE THOMPSON
(EDDIE THOMPSON, JR.),
Petitioner

vs.

HONORABLE WILFRID SCHRODER
PROBATE JUDGE, KENTON DISTRICT COURT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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29 pp

QUESTIONS PRESENTED

Can District (Probate) Judge arbitrarily deny person duly qualified and entitled to 'Appointment as Administrator of deceased mother's estate,' said appointment without just cause? K.R.S. 395.040(1)[2]

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(EDDIE THOMPSON, JR.),
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HONORABLE WILFRID SCHRODER
PROBATE JUDGE, KENTON DISTRICT COURT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

Comes now Petitioner, Eddie Thompson, Jr., (hereinafter Petitioner) and respectfully prays that a Writ of Certiorari issue to review the Judgment and Order of the Kentucky Court of Appeals.

OPINION BELOW

The Kenton District Court denied Petitioner's unchallenged Petition for Appointment of Administrator of his deceased mother's estate on April 25, 1988, (NR 4, App. P. 1a, 2a) Petition for Rehearing denied on June 1, 1988. (NR 10, App. P. 4a-1, 4a-2) Notice of Appeals was filed on June 29, 1988. (NR 11). On February 16, 1989, the Kenton Circuit Court refused to consider petitioner's (appeal) Petition for

Writ of Mandamus (App. P. 9) Motion for Rehearing and/or Reconsideration was denied on April 12, 1989. (App. P. 11). Petitioner's (appeal) Motion for Discretionary Review was denied by the Kentucky Court of Appeals on May 9, 1989. (App. P. 13) The Kentucky Supreme Court denied Motion for Discretionary Review on September 20, 1989. (App. P. 14)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).[1] The Supreme Court of Kentucky denied Discretionary Review on September 20, 1989, (App. P. 14), and this Petition for Writ of Certiorari is filed within ninety (90) days of that date.

The following decisions of this court sustain jurisdiction of this Court.

Broderick v. *Rosner*, 294 U.S. 629, 79 L Ed 1100, 55 S Ct 589

Conley v. *Gibson*, 355 U.S. 41, 78 S Ct 99, 2 L Ed 80 (1957)

Davis v. *Wechsler*, 263 U.S. 22, 68 L Ed 143, 44 S Ct 13

Mallard v. *U.S. District Court, Southern District of Iowa*, 109 S Ct 1814, 1818

Neitzke v. *Williams*, 109 S Ct 1827 (1989)

Puerto Rico v. *Branstad*, 107 S Ct 2803, 2808

U.S. v. *Ron Pair Enterprises, Inc.*, 109 S Ct 1026, 1030

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[1] 28 U.S.C. § 1257 provides: Final Judgments or Decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of it being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes, or commissions held or authority exercised under the United States.

STATEMENT OF FACTS

The instant action was filed pursuant to K.R.S. 395.040 (1).[2]

On April 25, 1988, Kenton District (Probate) Judge Schroder held a hearing on Petition (NR 2, App. P. 1) filed by Petitioner to be appointed Administrator of his deceased mother's (Mallie Thompson's) estate, with notice (NR 1, See proceeding, App. P. 1) to interested parties: Petitioner's father (E. J. Thompson, Sr.) and Petitioner's two brothers (James and Rudy Thompson). All interested parties agreed before the filing of the petition, that no objections would be filed, thus petitioner filed waiver of recording of proceedings. (NR 3, See App. P. 1)

Only petitioner and his father (E. J. Thompson) attended the hearing. No objections were filed and E. J. Thompson made no objections to the appointment of petitioner as Administrator of his deceased mother (Mallie Thompson).

Petitioner informed Judge Schroder that Affidavit of Descent has been filed on all real estate involved in the estate. Judge Schroder asked Petitioner if Petitioner had prepared a letter of Administration. Petitioner replied no. When Petitioner left the hearing, Petitioner assumed a letter of administration was forthcoming. Three (3) days after the hearing, Petitioner visited the clerk's office to check the record. No order granting or denying the letter of administration had been filed.

Petitoner visited Judge Schroder's chambers, where Judge Schroder informed Petitioner that he (Judge Schroder) would not grant the appointment of Petitioner as administrator[2] of

---

[2] K.R.S. 395.040(1) provides. The Court *SHALL* grant administration to the relations of the deceased who apply for administration preferring the surviving husband or wife, or if the surviving husband or wife does not nomiate a suitable administrator, then such others as are entitled to distribution, or one (1) or more of them whom the court judges will best manage the estate.

his deceased mother's estate, because, "real estate was in survivorship." Petitioner informed Judge Schroder that, there was no question of, "real estate in survivorship" before the court. The only question before the court was, "the appointment of Petitioner as administrator of his deceased mother's estate," pursuant to K.R.S. 395.040(1).[2]

Petitioner asked Judge Schroder to give his legal reasons for denying the appointment. Judge Schroder gave none. (NR 4, App. P. 3) Petitioner filed a motion for a rehearing (NR 5, See App. P. 1) and requested that the proceedings be stenographically recorded.

At a hearing on June 1, 1988, Petitioner informed Judge Schroder that there was no issue of any "property in survivorship" and presented a copy of the deed E. J. Thompson, Sr. had at the hearing of April 25, 1988. (NR 9, See App. P. 1) Petitioner further informed Judge Schroder that the purpose of the rehearing was to put on record any alleged evidence of any "property in survivorship" E. J. Thompson, Sr. was alleged to have. Judge Schroder said, "This could not be done because E. J. Thompson, Sr. was not present." Petitioner made an oral motion for continuance, so that any alleged evidence of any "property in survivorship" that E. J. Thompson, Sr. had could be made a part of the record. Judge Schroder overruled that motion. Petitioner requested that the record reflect that Petitioner's oral motion for continuance was overruled. Judge Schroder said, "The record will reflect the oral motion for continuance and the denial thereof." The record does not reflect the motion being made or overruled. Judge Schroder denied the motion for rehearing. (NR 10, App. 4)

There was no adverse parties in the Kenton District (Probate) Court.

Petitioner filed an appeal (Petition for Writ of Mandamus) in the Kenton Circuit Court to compel Judge Schroder to appoint Petitioner as administrator of Petitioner's deceased mother's estate or show cause why he refused to do so. (App.

P. 5) No response to Petitioner's verified complaint was filed in the circuit court on behalf of Judge Schroder, and no hearing was held.

On February 16, 1989, the Kenton Circuit Court entered an order affirming. (App. P. 9) The Kenton Circuit Court did not address Petitioner's Petition for Writ of Mandamus. Petitioner filed a motion for rehearing on February 24, 1989, which was overruled on April 12, 1989. (App. P. 11) Petitioner filed a motion for discretionary review (an appeal of Kenton Circuit Court order of February 16, 1989, App. P. 12) in the Kentucky Court of Appeals on March 20, 1989. (App. P. 12) The Kentucky Attorney General objected to the appeal. On May 9, 1989, the Kentucky Court of Appeals denied the appeal. (App. P. 13) On September 20, 1989, the Kentucky Supreme Court denied Discretionary Review. (App. P. 14)

REASONS FOR GRANTING THE WRIT

Can District (Probate) Judge arbitrarily deny person duly qualified and entitled to, appointment as administrator of deceased mother's estate, said appointment without just cause? K.R.S. 395.040(1)[2]

K.R.S. 395.040(1)[2] guarantees petitioner the rights and privileges[3] of being appointed administrator of his deceased mother's estate.

> It is the established rule in Kentucky that the county court (now District (Probate Court)) must conform to the directions set forth in the above subsection in the appointment of a personal representative to administer an estate. The right is a valuable one, and a person entitled to perform such a trust cannot be deprived of it without legal cause. *Skaggs* v. *Cook*, 374 S.W. 2d 857, 859 (KY 1964)
>
> Where only one qualified person applied for appointment as administrator and the heirs and distributees agreed to his appointment, there was no justification for the county court (now District (Probate Court)) refusing to appoint him and the Circuit Court properly ordered his appointment. *Holt* v. *Keller*, 319 S.W. 2d 45 (KY CA 1958)

No legal cause was presented at the hearing held on April 25, 1988. (NR 1, 2, 3, See App. P. 1) to deny Petitioner the appointment as Administrator of his deceased mother's estate and the court gave no justification for refusing the appointment.

Judge Schroder's conclusion, "property in survivorship" is not supported by the record and did not address the issue before the court. KRS 395.040(1).[2]

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[3] Article IV, § 2(1) U.S. Constitution provides, The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several States.

"Property in survivorship" suggests a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person. (See Black's Law Dictionary, fifth addition, P. 1433, Joint Wills) (Issue not before the court)

Judge Schroder's refusal to grant the appointment was clearly erroneous and an abuse of discretion.

Petitioner had requested that the rehearing held on June 1, 1988 be recorded. (NR 5, See App. P. 1). Judge Schroder refused to record the proceedings. Judge Schroder's Finding of Facts, entered on June 1, 1988, (NR 10, App. P. 4) is not supported by the record. There is no deed executed by Eddie Thompson, Sr. and Mallie Thompson, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common.

There are no adverse parties in this action.

> Neither the statutes nor the civil rules indicate the procedure for an appeal if there are no adverse parties. If an application in which all interested parties have joined is denied, they have no adversary against whom to take an appeal. In such a case the remedy that suggests itself as appropriate is mandamus against the judge who has refused the application. . . . Technically, the (Petitioner) did not sue for mandamus, but by making the judge the appellee in its appeal to the circuit court (Petitioner) accomplished the same purpose, so we treat that appeal as if it had been an original action in the circuit court for mandamus. *Schmitt* v. *The Kentucky Trust Company of Louisville*, 429 S.W. 2d 839, 841.

Even though there was no reply to the appeal (Petition for Writ of Mandamus, App. P. 5) or any evidence in the record of any deed or other testamentary instrument executed by E. J. Thompson, Sr. and/or Mallie Thompson in pursuance of a

common intention, for the purpose of disposing of any interest in any property, the Kenton Circuit Court, on February 16, 1989, (App. P. 9), concluded that, "The husband (E. J. Thompson, Sr.) of the deceased was present and had deeds showing all property was held in survivorship." The decision of the Kenton Circuit Court is clearly erroneous, not supported by the record and an abuse of discretion.

The decision denied the privileges and rights allowed by K.R.S. 395.040(1)[2] and contrary to Article IV, § 2(1).[3]

Petitioner filed a timely motion for rehearing on February 24, 1989. The Kenton Circuit Court overruled the motion on April 12, 1989. (App. P. 11)

In failing to consider the merits of Petitioner's appeal (Petition for Writ of Mandamus, App. P. 5), the Kenton Circuit Court effectively dismissed Petitioner's federal claim under Article IV, § 2(1)[3] as though the complaint, (Pet. for Writ of Mandamus, App. P. 5a) failed to state a claim.

> Civil Rules authorize a court to dismiss a claim only on the basis of a dispositive issue. *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 78 S Ct 99, 101-02, 2 L Ed 80 (1957).
>
> Rule permitting dismissal for failure to state claim does not countenance dismissal based on judge's disbelief of complaint's factual allegations. *Neitzke* v. *Williams*, 109 S Ct 1827, 1832 (1989).

Petitioner filed a timely appeal (motion for discretionary review) in the Kentucky Court of Appeals on March 20, 1989. (App. P. 12) Petitioner had to refile the appeal, because the brief did not contain certification of service on the circuit court clerk.

Judge Schroder did not file a response in the Court of Appeals. The Court of Appeals denied Petitioner's motion for appeal, without stating reasons. (App. P. 13) By denying the appeal, the Kentucky Court of Appeals denied petition and

appeal and the right of access to court guaranteed by the 1st Amendment to the U.S. Constitution.[4]

> The contract clause, the full faith and credit clause, *the privilege or immunities clause*, all fetter the freedom of a state to deny access to its court however much it may regard such withdrawal of jurisdiction, 'the adjective law of the state' or the exercise of its right to regulate 'the practice and procedure' of its courts. *Broderick* v. *Rosner*, 294 U.S. 629, 642, 79 L Ed 1100, 1107, 55 S Ct 589.

In denying motion for discretionary review, (App. P. 14), the Kentucky Supreme Court recognized that the Kentucky Court of Appeals had denied Petitioner access to court, when it said, "The motion to review the decision of the Court of Appeals is denied." The Court of Appeals denied Petitioner an appeal of his Petition for Writ of Mandamus (App. P. 5) to compel Judge Schroder to grant the letter of administration.

> Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. *Davis* v. *Wechsler*, 263 U.S. 22, 24, 68 L Ed 143, 145, 44 S Ct 13.
>
> (Neither the Kenton Circuit Court, nor the Kentucky Court of Appeals) may properly escape their constitutonal obligation by simple devise of denying jurisdiction in a case where the court is otherwise competent. *Kenny* v. *Supreme Lodge, L.O.*, 252 U.S. 411, 415, 64 L Ed 638, 640, 40 S Ct 371.

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[4] 1st Amendment, U.S. Constitution provides: Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

CONCLUSION

It is axiomatic that,

> Interpretation of a statute must being with the statute's language. *Mallard* v. *U.S. District Court, Southern District of Iowa*, 109 S Ct 1814, 1818; *U.S.* v. *Ron Pair Enterprises, Inc.*, 109 S Ct 1026, 1030.

K.R.S. 395.040(1)'s[2] operative term is "shall": The court *SHALL* grant administration to the relations of deceased who apply . . .

Only petitioner applied and other interested parties consented.

SHALL as used in statutes, contracts, or the like, is generally imperative or mandatory. . . . Black's Law Dictionary, Fifth Edition, P. 1233.

Federal Court may enjoin unconstitutional action by state officials (or State Court). *Puerto Rico* v. *Branstad*, 107 S Ct 2802, 2808.

It is clear that the Kentucky Court of Appeals denied Petitioner an appeal of the Kenton Circuit Court's refusal to consider Petitioner's claim that Petitioner was entitled to a letter of administration of Petitioner's deceased mother's estate, pursuant to K.R.S. 395.040(1)[2] and Article IV, § 2(1), of the U.S. Constitution.[3]

Wherefore, this Court should vacate the order of the Kentucky Court of Appeals and remand the case back to the Kenton Circuit Court with instructions that Petitioner be granted the letter of administration requested therein, and that Petitioner recover his costs expended herein.

Eddie Thompson, Jr.

AFFIDAVIT OF PROOF OF SERVICE

Comes now Eddie Thompson, Jr., Petitioner herein, first being duly cautioned and sworn and states as follows: On December _____, 1989, I deposited in a United States Post Office, three (3) copies of the instant Petition for Writ of Certiorari, in duly addressed envelopes, first class postage prepaid to: Hon. Wilfrid Schroder, Kenton District Judge, Hon. Raymond E. Lape, Kenton Circuit Judge, County Building, Third and Court, Covington, Ky. 41011, Hon. Frederic Cowan, Kentucky Attorney General, Capitol Building, and Mr. John Scott, Clerk, Kentucky Court of Appeals, 403 Wapping Street, both of Frankfort, Ky. 40601, and the Solicitor General, Department of Justice, Washington, D.C. 20530.

_____

Eddie Thompson, Jr.

Subscribed and sworn to before me this _____ day of December, 1989.

_____

NOTARY

_____

My Commission

APPENDIX

DOCKET ENTRIES

Date	Item	Proceeding
4/25/88	1.	Notice of hearing filed.
	2.	Petition for appt. of admtr. filed. (tendered)
	3.	Waiver of Recording filed.
	4.	Calendar docket from this date filed.
/ 4/88	5.	Petition for rehearing filed.
/ /88	6.	Mental Status Evaluation filed.
	7.	Report of Interdisciplinary evaluation team filed.
	8.	Report of second Interdisciplinary evaluation team filed.
	9.	Deed of both parties filed. Eddie Thompson & Eddie Thompson, Jr.
	10.	Calendar docket from this date filed.
/ 1/88		ESTATE CLOSED PER JUDGE WILFRID A. SCHRODER.
6/29/88	11.	Notice of Appeal filed by Eddie Thompson.
7/ 7/88	12.	Letter to Mr. Thompson informing him of filing fee filed.
7/11/88		ORIGINAL FILE TRANSFERRED TO CIRCUIT COURT, AFTER FILING FEE WAS PAID BY MR. EDDIE THOMPSON, RECEIPT OF $45.00 was included. gl.

[LETTERHEAD OF COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE]

Case No. 88-P-399

In re: Estate of Mallie Thompson
Birth date of decedent: June 8, 1912
Residence: 1208 Russell St., Covington, Ky. 41011
who died intestate on the 14 day of November, 1968

PETITION FOR APPOINTMENT OF ADMINISTRATOR

Petitioner Eddie Thompson, Jr. states that the statements in the caption are true and that the names of the surviving spouse, heirs at law and next of kin known to applicant are as follows:

Name: E. J. Thompson, Sr.; Relationship: Husband; Age: 82; Address: 132 W. 14th Street
Name: Rudy Thompson; Relationship: Son; Age: 46; Address: 1403 Russell Street
Name: James Thompson; Relationship: Son; Age: 44; Address: 1417 Russell Street
Name: Eddie Thompson, Jr.; Relationship: Son; Age: 52; Address: None given

Deceased owned or had interest in the following listed Real Estate with estimated market values as follows:
1208 Russell Street, 1209 Russell Street, 1417 Russell Street, 117 Acre Farm, Union, Ky.; Values unknown; 115 W. 11 St.

* * *

Petitioner applies for the probate of decedent's will which is filed herewith and which is the last will and testament of decedent.

Petitioner prays that Eddie Thompson, Jr., whose address is 309 Pleasant, be appointed as Executor-Administrator of said estate who offers as surety on the bond the following:

Petitioner says that all statements in the foregong are true.
/s/ EDDIE THOMPSON, Jr., 309 Pleasant Street

Subscribed and sworn before me by petitioner this 7th of April, 1988.
My commission will expire 3-16-92
/s/ MARILYN SMITH
Notary Public, Kenton County, Kentucky

* * *

CALENDAR
April 25, 1988
Probate Court
Wilfrid A. Schroder, Judge

Estate of Mallie Thompson
Admtr: Eddie Thompson, Jr.
88-P-399

Waiver of recording, property in survivorship, no need for probate.

June 1, 1988, 3:15 p.m.
IN RE: Estate of Mallie Thompson
88-P-399

Petition for rehearing, Findings; On April 25, 1988, this court denied the petition of Eddie Thompson, Jr. to open an estate on his mother. The husband of the deceased was present and had a deed showing all property was held in survivorship. The court ruled there was no need for probate and granted the husband's (E. J. Thompson, Sr.) request to deny the appointment. Exhibits A, B, C introduced by avowal. Exhibit D by avowal. Motion Denied.

Wilfrid Schroder
JUDGE

KENTON CIRCUIT COURT
FIRST DIVISION

NO. 88 X 23

IN RE: ESTATE OF MALLIE THOMPSON
EDDIE THOMPSON, JR.

APPELLANT

vs.

WILFRID SCHRODER, JUDGE

APPELLEE

STATEMENT OF APPEAL

The name of appellant is Eddie Thompson, Jr., P.O. Box 1221, Covington, Ky. 41012

Honorable Wilfrid Schroder, Kenton District (Probate) Judge Presided

No interested Party has opposed the appointment of Appellant as administrator, thus Honorable Judge Schroder is the Appellee.

Appellant desires oral arguments.

No Cross appeal has been filed and no supersedeas bond has been filed.

DATE OF ENTRY OF ORDER AND JUDGMENT

Petition for Appointment of Administrator was denied on April 25, 1988 (NR 4, App. P. 7), Petition for rehearing denied on June 1, 1988 (NR 10, App. P. 21) Notice of Appeal was filed on June 29, 1988 (NR 11, App. P. 22)

QUESTION PRESENTED

Can District (Probate) Judge arbitrarily deny person entitled to appointment as Administrator, said Appointment?

STATEMENT

On April 25, 1988, The Kenton District (Probate) Judge Schroder held a hearing on a petition filed by appellant to be appointed Administrator of his deceased Mother's (Mallie Thompson's) Estate, with notice to the interest parties; Appellant's father (E. J. Thompson, Sr.) and appellant's Brother's (James and Rudy Thompson). All interested parties agreed before the hearing that no objections would be filed to the appointment, thus appellant filed a waiver of recording of proceedings. James and Rudy Thompson did not appear at the hearing held on April 25, 1988. E. J. Thompson, Sr. did appear. E. J. Thompson, Sr. had a copy of a deed from appellant and his wife (Patricia Thompson) to E. J. Thompson, Sr. and his wife (Mallie Thompson). (App. P. 18) E. J. Thompson, Sr. made no effort to introduce the deed into evidence or say he objected to appellant being appointed Administrator of Mallie Thompson's estate. Appellant informed the court that affidavits of descent had been filed on all real estate involved in the estate. Judge Schroder asked appellant, if appellant had prepared a letter of administration. Appellant replied no. When appellant left the hearing, appellant assumed a letter of administration would be granted. Three (3) days after the hearing when appellant visited clerk's office, no calendar docket denying appellant's appointment as administrator. Appellant visited Judge Schroder's Chambers, where Judge Schroder informed appellant he (Judge Schroder) would not grant the appointment. When appellant asked Judge Schroder why not? Judge Schroder said, "because the real estate was in Survivorship". Appellant informed Judge Schroder that there was no question of survivorship of any property before the court, that the only question was, "the appointment of appellant as administrator of his deceased mother's estate". Appellant asked Judge Schroder to give his legal reasons for denying the appointment. Judge Schroder could give none.

Appellant filed a motion for a rehearing and requested that the proceeding be stenographically recorded. A hearing was

set for June 1, 1988. Hon. Steve Jaeger, Judge was scheduled to hear probate cases at the time the rehearing was scheduled. Recognizing his earlier decision was erroneous, Judge Schroder declined to let a judge who may have been impartial hear the case.

At the outset Judge Schroder remarked, if there was nothing new, the motion would be denied. Appellant informed the court that since there were no objections to the appointment, appellant was the appointment as a matter of law. Appellant also informed the court that his dad, E. J. Thompson, Sr. had been declared disable to manage his business affairs by a interdisclinary team, that Mr. John Elfers, Kenton County Attorney had fraudulently withheld this information from a Jury, but appellant had copies of the reports. (NR 6, 7, 8, App. P. 9, 12, 15) Appellant further informed the court that appellant had a copy of the deed that E. J. Thompson, Sr. had at the original hearing and that appellant wished to question E. J. Thompson, Sr. for the record as to whether he requested Judge Schroder to deny Appellant's request for the appointment as administrator for Mallie Thompson's estate. Judge Schroder said, "that could not be done, because E. J. Thompson, Sr. was not present." Appellant made oral motion for a continuance, so E. J. Thompson, Sr. may put any objections he had, if any, against Eddie Thompson, Jr. being appointed administrator of Mallie Thompson Estate on the record. Judge Schroder OVERRULED that motion. Appellant requested that the record reflect the motion and the ruling. Judge Schroder said the record would reflect the motion and the ruling. The record does not reflect the motion or the ruling. The motion for rehearing was OVERRULED. The denial of the appointment was fraudulent and racially motivated, denying due process and equal protection of the law under the 14th amendment of the U. S. Constitution.

Appellant asked in the Clerk's Office, how many days he had to file a notice of appeal. That information was not available from the Clerk's office. On June 29, 1988 Appellant

filed a notice of appeal and asked how the filing fee was. Appellant was told by the deputy clerk that no fee was due. On July 7, 1988 the Clerk's office informed Appellant that a fifty (50.00) dollar filing fee was due. (NR 12, App. P. 23) When appeared to pay the fee, the fee was Forty-five (45.00) dollars.

The copy of the death certificate Appellant filed with the petition for the appointment as administrator is not in the record. A copy is in the Appendix, page 4. The two (2) entries on the calendar docket, NR 4, "Property in survivorship and no need for probate" were not on record, when appellant checked the record on April 28, 1988. NR 9 Deed of both parties filed. Eddie Thompson & Eddie Thompson, Jr. is fraudulent. E. J. Thompson, Sr. was not a party to this action, never offered any deed to be filed and was not present on June 1, 1988. Appellant was told by Judge Schroder's secretary that there was no tapes or transcript of the rehearing.

/s/ EDDIE THOMPSON, JR.

Subscribed and sworn to before me this 29th day of July, 1988.

/s/ MARILYN SMITH
Notary

My Commission expires: 3-16-92

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
FIRST DIVISION

NO. 88-X-23

IN RE: ESTATE OF MALLIE THOMPSON
(EDDIE THOMPSON, JR.)
APPELLANT,

vs.

WILFRID SCHRODER, JUDGE,
APPELLEE.

APPEAL FROM THE KENTON DISTRICT COURT
HON. WILFRID SCHRODER, JUDGE
ORIGINAL CASE NO. 88-P-399
(Entered February 16, 1989)

AFFIRMING

This is an Appeal from the Kenton District Court from an Order denying Petitioner's request to be appointed Administrator of his deceased mother's estate (Mallie Thompson — Date of Death November 14, 1968).

The Notice of Appeal was tendered June 29, 1988, filed of record July 11, 1988, and the Statement of Appeal was filed July 29, 1988. The Court will consider that the Notice of Appeal was filed in a timely manner because there was some problem with the filing fee, however, that had been paid, and The Court considers that the Notice of Appeal was timely filed.

A review of the record indicates that on June 1, 1988, at approximately 3:15 P.M. Eddie Thompson, Jr., the son of the deceased, Mallie Thompson, had petitioned The Court to be appointed as the Administrator of his mother's estate who had

died on November 14, 1968, in Memphis, Shelby County, Tennessee. He had listed the names of his father, E. J. Thompson, Sr., and his brother, Rudy Thompson and James Thompson and himself as heirs at law and next of kin.

The Court entered Findings at that time that on April 25, 1988, The Court denied the Petition of Eddie Thompson, Jr., to open an estate on his mother. The husband of the deceased was present and had deeds showing all property was held in survivorship. The Court ruled there was no need for probate and granted the husband, E. J. Thompson Senior's, request to deny the appointment of Eddie Thompson, Jr., as the Administrator of the estate.

This Court has reviewed the Statement of Appeal in detail along with the entire file and it would appear from the application of the Appellant the only property that the deceased owned or had an interest in was real estate located at 1208 Russell Street, 1209 Russell Street, 1417 Russell Street, Covington, Kenton County, Kentucky; a one hundred and seventeen acre farm in Union, Boone County, Kentucky and property located at 115 West Eleventh Street, Covington, Kenton County, Kentucky.

That under the personal property and estimated market values there is no property listed.

Since there was no showing that the deceased had an estate other than that which was held in survivorship with her husband, that there was no reason to open an estate. Courts are not obligated to make futile gestures. "*Frustra probatur quod probatum non relevat.*"

The Judgment of the Kenton District Court is AFFIRMED and is in full force and effect.

So ORDERED this 16th day of February, 1989.

/s/ RAYMOND E. LAPE, JR.
JUDGE

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
FIRST DIVISION

NO. 88-X-23

IN RE: THE ESTATE OF MALLIE THOMPSON
(EDDIE THOMPSON, JR.)
PETITIONER-APPELLANT,
vs.
WILFRID SCHRODER, JUDGE,
RESPONDENT-APPELLEE.

ORDER
(Entered April 12, 1989)

This matter is before the Court on the Motion of the Appellant for Rehearing and/or Reconsideration and the Court, having reviewed the file and being sufficiently advised,

IT IS NOW, THEREFORE, ORDERED that the Motion is hereby OVERRULED and the Judgment of the Kenton District Court is in full force and effect.

So ORDERED this 11th day of April, 1989.

/s/ RAYMOND E. LAPE, JR.
JUDGE

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

FILE NO. 89-CA-000632

EDDIE JR THOMPSON
APPELLANTS

vs.

WILFRID SCHRODER
(JUDGE KENTON DISTRICT COURT)
APPELLEES

THE APPELLANT (#1 BELOW) HAS TENDERED FOR FILING ON MAR. 20TH 1989 THE PLEADING IDENTIFIED BELOW WHICH CANNOT BE FILED BECAUSE IT IS DEFICIENT AS EXPLAINED BELOW. THE PLEADING MUST BE CORRECTED TO MEET MINIMUM FILING STANDARDS.

IT IS ORDERED THAT THE CLERK SHALL RETURN THE PLEADING AND THE APPELLANT (#1 BELOW) SHALL HAVE TEN (10) DAYS FROM THE DATE OF THIS ORDER TO MAKE THE NECESSARY CORRECTIONS. TIME FOR ANY FURTHER STEPS WILL BEGIN TO RUN FROM THE DATE THIS PLEADING IS FILED, NOTICE OF WHICH WILL BE SENT.

ENTERED: 03/20/89

J. WILLIAM HOWERTON
CHIEF JUDGE,
COURT OF APPEALS

PLEADING: DEFICIENT MOTION FOR DISCRETIONARY REVIEW

DEFICIENCY REASON(S):

76.70 (7) CERTIFICATE OF SERVICE MUST SERVE CIRCUIT COURT CLERK

#1: EDDIE JR THOMPSON

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 89-CA-632-D

EDDIE THOMPSON, JR.

MOVANT

vs.

WILFRID SCHRODER, PROBATE JUDGE
KENTON DISTRICT COURT

RESPONDENT

**ON MOTION FOR DISCRETIONARY REVIEW
FROM KENTON DISTRICT COURT
ACTION NO. 88-XX-23**

ORDER

BEFORE: HOWERTON, CHIEF JUDGE, CLAYTON, AND REYNOLDS, JUDGES.

Having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, the Court ORDERS the motion be DENIED.

/s/ CHARLES H. REYNOLDS
JUDGE, COURT OF APPEALS

ENTERED: May 9, 1989

SUPREME COURT OF KENTUCKY

89-SC-417-D
(89-CA-632)

KENTON CIRCUIT COURT
88-XX-023

EDDIE THOMPSON, JR.

MOVANT

vs.

WILFRID SCHRODER,
PROBATE JUDGE, KENTON DISTRICT COURT

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED September 20, 1989.

/s/ ROBERT F. STEPHENS
Chief Justice